INDEX

	Page
Questions presented	1
Statement of the case	2
Reasons for not granting the writ	3
Conclusion	7
Appendix	A-1
Letter from United States Court of Appeals requesting affidavit	A-1
Affidavit	A-2

Table of Authorities

Close v. Lederle, 424 F.2d 988, cert. den. 400 U.S. 903 6

Healy v. James, 408 U.S. 169, 92 S.Ct. 2338 .....3, 4, 6

Lewis v. City of New Orleans, 40 U.S.L.W. 3614 5

Rosenfeld v. New Jersey, 40 U.S.L.W. 3612 5

Tinker v. Des Moines Independent School District, 393 U.S. 503 (1970) 3, 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-794

BARBARA SUSAN PAPISH,
Petitioner,

v.

THE BOARD OF CURATORS OF THE UNIVERSITY OF MISSOURI, et al.,
Respondents.

RESPONDENTS' BRIEF

In Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Respondents pray the Court to deny the application for a writ of certiorari to issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered June 15, 1972.

QUESTIONS PRESENTED

1. Respondents believe that the only determinative issue in this case is whether the University of Missouri has a right to determine a standard of decency in the public use and display of language and pictures on the campus of the

University, which standard does not limit the advocacy o free expression of ideas.

Respondents do not believe that any question of "lega obscenity" is involved as "legal obscenity" is defined i relation to criminal statutes as in the Roth and othe cases cited by Petitioner.

2. Respondents further do not believe the second ques tion propounded by Petitioner is determinative or eve involved, since the Circuit Court of Appeals disregarde the General Order of the District Court, and found n record support for Petitioner's claim that the Distric Court was influenced by that Order (App. 9a, Footnote 10)

STATEMENT OF THE CASE

The Respondents submit the following additions an corrections to Petitioner's Statement of the Case.

The Petitioner had been a graduate student at the Uni versity since the fall of 1963 (J.A. 27a), was on aca demic probation (J.A. 66a) and was on disciplinary pro bation (J.A. 37a) at all times relevant hereto, and i not eligible to return to the University of Missouri as graduate student [Affidavit filed in Court of Appeals pe request of that Court (Resp. p. A-3)].

The Respondents further submit that the article in th issue of the newspaper distributed by Petitioner whic bore the headline "M_____ Acquitted" containe no reference (J.A. 94a) to the political group referred t in Petitioner's Statement of the Case (App. 4, J.A. 141a)

The place of distribution was in and near the Memoria Tower on the campus, through which pass parents o students, guests of the University, students, including man persons under 18 years of age, and high school student (App. 26a, 5a, J.A. 31a).

REASONS FOR NOT GRANTING THE WRIT

Respondents do not believe this to be a case justifying the granting of a writ of certiorari to the Supreme Court.

1. Aside from other considerations, and even though the Court of Appeals determined that the matter was not moot, the Petitioner in this case will not be eligible to return to the University for scholastic reasons, since she has not fulfilled the requirements of scholastic probation imposed on January 31, 1969 (J.A. 66a, 67a and Resp. p. A-3 *supra*).

2. Respondents believe the only question presented in this case is whether the University of Missouri had a right to terminate the student status of Petitioner for deliberately, and with full knowledge of the facts, distributing copies of an issue of the **Free Press Underground** which had on its cover a cartoon depicting helmeted, club-wielding policemen raping the Statue of Liberty and the Goddess of Justice and which contained a headline "M_____ Acquitted" which headline had no observable relationship to the story which followed (J.A. 94a), and with Petitioner knowing at the time of such distribution that the matters displayed in the issue being distributed had been banned for distribution by the University upon a determination that it was in violation of the University's standard of decency in the use and display of language and pictures on the campus.

The decision of the Court of Appeals is not in conflict with the cases of **Healy v. James**, 408 U.S. 169, 92 S.Ct. 2338, and **Tinker v. Des Moines Independent School District**, 393 U.S. 503 (1970). What the Court of Appeals holds is set forth in substance in four sentences from the opinion:

"But there is no evidence in this record to indicate that the University so applied its rule of conduct as to penalize Miss Papish for advocacy of her ideas" (App. 15a).

"What the record does reflect is an application of the rule to discipline Miss Papish for the manner in which she sought to exercise her rights" (App. 15a). "The University could and did rightfully regulate the means by which she sought to espouse her views, but it did so without effectively repressing her ability to advocate the causes to which she professed such profound dedication" (App. 15a, 16a).

"But no provision of the Constitution requires the imposition of so high a value on freedom of expression that it can never be subordinated to other interests such as, for example, the conventions of decency in the use and display of language and pictures on a university campus" (App. 16a).

This holding is consistent with—not in conflict with—**Healy v. James**, *supra*. In Healy, this Court recognized "the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools" (92 S.Ct., l.c. 2345). The Court held, however, that the college in that case had **denied** the associational right, not, as in this case, simply **regulating the means by which such right should be exercised.** The Court recognized this right to regulate in the college by stating, "Just as in the community at large, reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech-related activities must be respected" (92 S.Ct., l.c. 2352). Neither Respondents nor the Court of Appeals overlooked recognizing that First Amendment rights should apply with equal force on college campuses as in the community

at large but recognized, as approved by this Court, that reasonable regulation could be applied to the exercise thereof.

Tinker, *supra*, likewise recognized the distinction between the right itself and the power to regulate the means by which such right should be exercised when the Court states,

> "First Amendment rights, **applied in light of the special characteristics of the school environment**, are available to teachers and students." (Emphasis added.) (89 S.Ct. 733, l.c. 736)

and

> "There is no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone" (*supra*, l.c. 737).

Rosenfeld v. New Jersey, 40 U.S.L.W. 3612, and **Lewis v. City of New Orleans**, 40 U.S.L.W. 3614, are not in conflict. Both are criminal cases, not school discipline cases, and both recognize the right to regulate time, place, and manner of exercising First Amendment rights, **even in criminal cases.**

The position upheld by the Court of Appeals with regard to Respondents' regulations and the application thereof to Petitioner is reinforced by quoting Mr. Justice Powell, when he stated, in Rosenfeld (40 U.S.L.W. 3613),

> "One of the hallmarks of a civilized society is the level and quality of discourse. We have witnessed in recent years a disquieting deterioration in standards of taste and civility in speech. For the increasing number of persons who derive satisfaction from vocabularies dependent upon filth and obscenities, there

> are abundant opportunities to gratify their debased tastes. But our free society must be flexible enough to tolerate even such a debasement provided it occurs without subjecting unwilling audiences to the type of verbal nuisance committed in this case. The shock and sense of affront, and sometimes the injury to mind and spirit, can be as great from words as from some physical attacks."

The instant case is most akin to **Close v. Lederle**, 424 F.2d 988, 990 (1970), cert. den. 400 U.S. 903, where the court said, "The corridor was a passageway, regularly used by the public, including children . . . Where there was, in effect, a captive audience, defendant had a right to afford protection against 'assault upon individual privacy' . . . short of legal obscenity." The court further quotes Professor C. A. Wright, **The Constitution on the Campus**, 22 Vand.L.Rev. 1027, 1040 (1969), "There are words that are not regarded as obscene, in the constitutional sense, that nevertheless need not be permitted in every context."

3. Petitioner objects to the "General Order" of the District Court for the Western District of Missouri, even though it was not relied on by the Court of Appeals (App. 9a). Petitioner's objection is based on the ground that the General Order distinguishes between university and college regulations and criminal laws. Respondents do not believe this to be in conflict with any holding of this Court. See concurring opinion of Mr. Justice Rehnquist in **Healy v. James**, 408 U.S. 169, 92 S.Ct. 2338, l.c. 2356.

CONCLUSION

Respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

JACKSON A. WRIGHT
General Counsel
The Curators of the University
of Missouri
227 University Hall
Columbia, Missouri 65201

Of Counsel
MARVIN E. WRIGHT
JAMES S. NEWBERRY
227 University Hall
Columbia, Missouri 65201

United States Court of Appeals
For the Eighth Circuit
St. Louis, Mo. 63101

Robert C. Tucker, Clerk

July 28, 1972

Messrs. Dennis J. Stewart,
Jackson A. Wright and
Marvin E. Wright
Office of General Counsel
University of Missouri
University Hall
Columbia, Missouri 65201

Re: No. 71-1338. Barbara Susan Papish v. The Board of Curators of the University of Missouri et al.

Dear Sirs:

In connection with a pending petition for rehearing en banc filed by appellant in this case I am directed by the Court to require you to obtain an affidavit from the proper official of the University regarding present status of the appellant Barbara Susan Papish vis-a-vis University of Missouri. I would appreciate it very much receiving this affidavit from you on or before August 7, 1972.

Very truly yours,
/s/ Robert C. Tucker
Robert C. Tucker
Clerk

dw
copy
Mr. David N. Ellenhorn
Mr. Irving Achtenberg
Mr. Melvin L. Wulf

United States Court of Appeals
for the Eighth Circuit

No. 71-1338

Barbara Susan Papish,
Plaintiff-Appellant,

vs.

The Board of Curators of the University of Missouri, et al.,
Defendants-Appellees.

AFFIDAVIT

State of Missouri }
County of Boone } ss.

Andrew C. Minor, being duly sworn, states:

1. My name is Andrew C. Minor, Route 1, Columbia, Missouri, and I am Associate Dean of the Graduate School, University of Missouri, Columbia, Missouri.

2. This affidavit is made on behalf of The Curators of the University of Missouri pursuant to the request of this Court contained in the letter from Robert C. Tucker, Clerk, dated July 28, 1972.

3. Affiant is in charge of the records of graduate students enrolled in the Graduate School at the University of Missouri, Columbia, Missouri, and as such is familiar with the rules, regulations and requirements of the University of Missouri—Columbia, for admission and retention as a student in the Graduate School (See Exhibit A), and has examined the records of Barbara Susan Papish, a former student and candidate for the Master's degree in Journalism.

4. Affiant has reexamined the affidavit made by affiant on September 15, 1969, and filed in this cause as Exhibit 15 to Stipulation III in the District Court for the Western District of Missouri, and which appears at page 66a, marked Exhibit 5-A, of the Appendix on file in this Court. The facts stated in said affidavit are still true.

5. Affiant further states that to affiant's knowledge, Barbara Susan Papish has not been a student and has not applied for admission to the Graduate School at the University of Missouri, Columbia, Missouri, since September, 1969.

6. Affiant further states that the record of Barbara Susan Papish shows a Graduate School grade average of 2.55. Under normal circumstances, Barbara Susan Papish is not eligible for re-enrollment in the Graduate School because her average of 2.55 is below the requirement that a student must maintain a cumulative grade point average of 2.75 or better.

7. However, since Barbara Susan Papish, while a student, was placed on scholastic probation on January 31, 1969, and failed to fulfill the terms of such probation, as set forth in affiant's previous affidavit, said Barbara Susan Papish is not eligible for readmission to the Graduate School on scholastic probation on two grounds:

(a) She did not fulfill the requirements of her previous probation, and

(b) Her grade average of 2.55 is below the acceptable average of a 2.75 average to be continued on academic probation, unless readmission for one additional probationary semester were recommended by her graduate department of Journalism.

8. The grade average of Barbara Susan Papish of 2.55 was computed without regard to the courses in which

she enrolled for the winter semester, 1969. However, even taking into consideration a 3-hour course in Ceramics 4, course number 332, in which she would have received a grade of B (3.00 grade) (Appendix 49a and 16a) and a 1-hour course in Research Journalism, course number 490, in which she would have received a grade of F (0.0 grade) (Appendix 49a and 43a) her grade average would have raised only to 2.56.

/s/ Andrew C. Minor
Andrew C. Minor

Subscribed and sworn to before me this 2nd day of August, 1972, at my office in Columbia, Boone County, Missouri.

My commission expires May 30, 1974.

/s/ Sue Hagan
Sue Hagan
Notary Public

Exhibit A

University of Missouri—Columbia
Bulletin 1972
Graduate Catalog

***Scholastic Standing**

The grade point average in the Graduate School is based on the student's entire graduate record in courses numbered 200 and above taken at UMC. To remain in good standing, a graduate student must maintain a cumulative grade point average of 3.0 or better. For graduation, the student must earn A or B grades in at least 75 per cent of the hours completed in courses numbered 200 and above carried for graduate credit.

***Probation**

At the end of any semester, a graduate student whose grade point average is below 2.75 will be placed on probation. If, at the end of the following semester, his cumulative grade point average is 2.75 or better, he will be removed from probation. A student on probation who fails to raise his cumulative grade point average to 2.75 may be allowed a second and final probationary semester on the recommendation of his department or area. A student is subject to dismissal if he fails to raise his cumulative grade point average to 2.75 by the end of a second probationary semester or at any time that his semester or cumulative grade point average falls below 2.0.